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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

ROSALIE MELLOR, Plaintiff and Appellant, v. ARNOLD SCHULER, Defendant and Respondent.	C036132 (Super. Ct. No. CV-005658)

Plaintiff Rosalie Mellor sued defendant Arnold Schuler after she was injured in a waterskiing accident. Summary judgment was entered in favor of defendant, based upon primary assumption of the risk. Plaintiff appeals contending (1) primary assumption of the risk does not bar her negligence cause of action because (a) plaintiff and defendant were not coparticipants at the time of injury, (b) imposing liability would not chill participation in or alter the nature of the sport of waterskiing, (c) the risk was not inherent in the sport, and (d) as a matter of public policy, a duty of care should be imposed on defendant; and (2) the trial court's

determination was not supported by admissible evidence. Finding primary assumption of the risk bars plaintiff's negligence cause of action, we affirm.

FACTS

On August 22, 1997, plaintiff was waterskiing with defendant on the San Joaquin Delta. Defendant both owned and operated the ski boat involved. Plaintiff, defendant, and two others had been boating and waterskiing in defendant's boat for approximately four hours on the day in question. The group took turns waterskiing behind the ski boat. Between ski runs, each person would reboard the ski boat and ride in the boat while another person waterskied. Prior to the incident in question, plaintiff was waterskiing behind defendant's boat. While plaintiff was in the process of returning to the boat, after her last run, defendant put the boat's transmission in, what he believed to be, the neutral position, that is, the motor disengaged from the propeller. As the conditions were choppy, defendant could not, from his vantage point, decipher any movement in the water indicating the propeller was still engaged. Defendant instructed plaintiff to hold onto the towrope and helped her return to the boat. While being assisted back to the boat, plaintiff crossed near the stern and the ladder providing access onto the boat. As plaintiff was being pulled toward the boat, she noticed the dirty water of the Delta churning. Realizing the propeller was turning, plaintiff dropped the towrope and forcefully kicked in an attempt to avoid

the propeller. In the process of kicking, plaintiff's leg came into contact with the engaged propeller, causing her injury.

Defendant stated that, during more than 25 years of waterskiing, he had left the motor running with the transmission in neutral while recovering skiers from the water and he had seen many others employ the same practice. Plaintiff did not contest, and actually admitted, a boat driver could safely recover a skier by putting the boat in neutral. Defendant additionally presented the deposition testimony of an experienced ski boat operator, Edward Vandermeulen, who stated he occasionally used the same procedure. Plaintiff made no attempt to rebut this evidence. With no evidence to the contrary, the record indicates the practice of leaving the motor in neutral when retrieving skiers from the water is a common activity associated with the sport.

Plaintiff brought a personal injury action against defendant for negligence and negligent entrustment. Plaintiff concedes the negligent entrustment cause of action was merely precautionary and there are no facts to support it. Summary judgment was entered in favor of defendant based upon primary assumption of risk. Plaintiff appeals.

STANDARD OF REVIEW AFTER SUMMARY JUDGMENT

Under Code of Civil Procedure section 437c[1] a motion for summary judgment must be granted if the evidence shows there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.) A defendant is entitled to summary judgment if the undisputed facts do not give rise to a cause of action or there is a complete defense to the cause of action. (*Id.* at p. 849.) De novo review is the appropriate standard of appellate review after entry of summary judgment. (*Schrader v. Scott* (1992) 8 Cal.App.4th 1679, 1683.) The reviewing court strictly construes the evidence of the moving party and liberally construes the evidence of the opponent. (*Aguilar v. Atlantic Richfield Company*, *supra*, 25 Cal.4th at p. 843.)

A defendant who moves for summary judgment based on primary assumption of the risk has the burden of establishing there was no duty to protect the plaintiff from harm. (See *Aguilar v. Atlantic Richfield Company*, *supra*, 25 Cal.4th at p. 843.) The existence and scope of any duty owed to the plaintiff is a legal question for the courts. (*Yancey v. Superior Court* (1994) 28 Cal.App.4th 558, 562.) Additionally, the court is to determine, as a matter of law, the elements on which the existence of a duty depend. (*Ibid.*)

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[1] All code references are to the Code of Civil Procedure, unless otherwise noted.

Once a court has determined a defendant has met this burden, the burden shifts to the plaintiff to show a triable issue of material fact exists. (§ 437c, subd. (o)(2); *Schrader v. Scott, supra,* 8 Cal.App.4th at pp. 1683-1684.) The plaintiff may not speculate or rely upon mere conjecture to refute the defendant's evidence, but instead, specific facts must be introduced to show a triable issue of fact exists. (§ 437c, subd. (o)(2).) If the plaintiff fails to meet this burden, summary judgment is appropriate. (§ 437c, subd. (c).)

DISCUSSION

I

Assumption of the Risk

Plaintiff contends the trial court erred in entering summary judgment because primary assumption of the risk does not bar her negligence cause of action.

Assumption of the risk is divided into two categories: "primary" assumption of the risk, where no duty was breached, and "secondary" assumption of the risk, where the plaintiff assumes a known risk of injury caused by the defendant's breach of duty. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308.) "Primary" assumption of the risk acts as a complete bar to recovery because there are no grounds for imposing liability on the defendant, as there is no breach of a legal duty. (*Id.* at p. 309.) However, in cases involving "secondary" assumption of the risk, the defendant has breached a legal duty to the plaintiff, but the plaintiff knowingly assumed the risk. (*Ibid.*) Determination of whether "primary" or "secondary"

assumption of the risk applies depends entirely on the existence or nonexistence of a duty. (*Id.* at p. 315.)

In the context of sports, whether the defendant owes a duty to the plaintiff does not depend on the reasonableness or unreasonableness of the plaintiff's conduct. (*Knight v. Jewett, supra,* 3 Cal.4th at p. 309.) Instead, the court looks at the nature of the sport in which the plaintiff was engaged and the relationship between the sport and the roles of the plaintiff and the defendant. (*Ibid.*)

There is no duty to eliminate or protect another from the risks inherent in the sport itself. (*Knight v. Jewett, supra,* 3 Cal.4th at pp. 315-316.) However, there is a duty to use due care not to increase the risks to the participants beyond those inherent in the sport. (*Ibid.*) Liability will be imposed on participants in active sports only when a participant intentionally injures a coparticipant or the conduct is so reckless it is "totally outside the range of the ordinary activity involved in the sport." (*Id.* at p. 320.) It is improper to hold a participant liable for merely careless or negligent conduct committed during participation in a sport. (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342.) Conduct is deemed outside the scope of ordinary activities, and thus, any consequential risks are not inherent to the sport, if the prohibition of the conduct would neither "deter vigorous participation in the sport nor fundamentally alter the nature of the sport." (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1394.) This rationale applies to all active sports, even when engaged

in on a non-competitive basis, such as waterskiing. (*Ford v. Gouin, supra,* 3 Cal.4th at p. 345.)

A. Coparticipants

Plaintiff's first contention is primary assumption of the risk should not bar her claim because, at the time of the incident, plaintiff and defendant were not coparticipants in the active sport of waterskiing as required for the defense to apply. (*Ford v. Gouin, supra,* 3 Cal.4th at pp. 344-345.) Plaintiff states it was undisputed she had finished her last "waterski run" and was getting back into the boat, and, therefore, she was no longer engaged in the active sport of waterskiing when the incident occurred. As such, plaintiff contends she and defendant were no longer coparticipants.

As noted by *Ford*, a waterskier and a ski boat driver are deemed coparticipants while waterskiing. (*Ford v. Gouin, supra,* 3 Cal.4th at p. 345.) *Ford* cannot be limited to its facts as plaintiff advocates. Coparticipation in waterskiing involves more than the actual act of the ski boat driver pulling the waterskier across the water. Thus, if plaintiff and defendant were engaged in one of the many acts of waterskiing, they were coparticipants for the purposes of primary assumption of the risk.

Plaintiff's reliance on the undisputed facts to establish she and defendant were not coparticipants is misguided. The undisputed fact was the plaintiff had finished her waterski run and was attempting to reboard the boat. If plaintiff were correct, the sport of waterskiing would be over each and every

time a waterskier fell in the water. This position is clearly erroneous. Waterskiing is more than the actual act of planing across the water. As the trial court properly noted, the after-ski-run convergence of boat and skier and reboarding are typical adjuncts to the act of skiing across the water and, as such, are a part of the sport and fall within the ambit of the primary assumption of risk doctrine.

Plaintiff argues the finding of coparticipancy in this scenario would create an anomaly because if she had been a swimmer in the water, and not a waterskier, defendant would be liable. Plaintiff's analogy to a swimmer in the water is misplaced. This case involves waterskiing, not swimming. The nature of the sport itself is critical to the determination of a duty. Waterskiing requires a boat with propellers or some other means of locomotion and, consequently, waterskiers are placed at risk of injury from propellers. For example, typically, ladders on ski boats are located at the rear of the boat, near the propeller. In fact, plaintiff concedes in order to reboard the boat she had to use the ladder at the rear of the boat, necessarily putting her in close proximity to the edges of the propeller, which could have cut her even if she kicked them with the motor turned off.

Furthermore, in her analogies, plaintiff ignores the fact that the entire purpose of the boating excursion was for a day of waterskiing, not swimming, or some other hypothetical purpose. People were on the boat explicitly to engage in the active sport of waterskiing. Waterskiing consists of a set of

activities, including disembarking, reboarding, and riding in the boat as others take their turns waterskiing. Plaintiff's arguments are consistent with neither the sport of waterskiing nor the policy behind primary assumption of the risk. Plaintiff and defendant were coparticipants in the active sport of waterskiing when the incident in question occurred.

B. Effect of Liability on the Sport

In order for the defense of primary assumption of the risk to apply, the evidence must show either vigorous participation in the sport or activity would be chilled or the nature of the sport itself would be altered if legal liability were imposed. (*Knight v. Jewett, supra,* 3 Cal.4th at pp. 318-319.)

Plaintiff argues the imposition of a duty on defendant would in no way chill or alter participation in the active sport of waterskiing. Plaintiff bases this contention, once again, on the argument she was not participating in the active sport of waterskiing and thus, imposing a duty would have no adverse effect on the sport. As addressed previously, plaintiff was still engaged in the active sport of waterskiing and thus, this argument is without merit.

Furthermore, the imposition of a duty in this case would have a deleterious effect of the kind primary assumption of the risk was designed to prevent. Vigorous participation in sports would be chilled if legal liability were imposed for a participant's ordinarily careless conduct. (*Knight v. Jewett, supra,* 3 Cal.4th at pp. 318-319.) This policy applies equally to non-competitive activities, such as waterskiing. (*Ford v.*

Gouin, supra, 3 Cal.4th at p. 345.) Imposition of liability on ski boat drivers for ordinary careless conduct would have an adverse effect on the sport as a whole. (*Ibid.*)

Recall that defendant attempted to put the transmission in neutral and believed he had done so. If he had succeeded, plaintiff presumably would not have been injured. Accordingly, the duty plaintiff seeks to impose would require something more than merely attempting to put the transmission in neutral -- whether that might be going through some process to insure the propeller was not still turning or actually turning the motor off.

Numerous chilling effects on waterskiing would result if a duty were imposed in this case to turn the motor off before retrieving the waterskier. Maneuvering a ski boat through water is an intricate task. Great skill is required to position a ski boat correctly when picking up a fallen waterskier. The driver must deal with the current and chop of the water, as well as the wind and other weather conditions. The driver must be conscious of other boats, watercraft and waterskiers in the water. Skill must be utilized in locating the downed skier, quickly getting to the skier, and positioning the boat safely to pick up the skier. Once the driver has placed the boat accordingly, the water and weather conditions may, and often do, warrant adjustments to be made to the position of the boat. In order to make any corrections, the boat must have power to the motor.

Furthermore, at the end of a waterski run, a skier may be fatigued and sometimes exhausted or may be chilled from cold

water. It is essential for the ski boat driver to be able to engage the boat immediately in case the cold or the fatigue become life-threatening to the waterskier. It is common for the ski boat driver to re-position the boat closer to the skier so other participants may assist the skier back into the boat. Thus, recovering the skier is a complex task requiring boat mobility. It is both risky and difficult to turn the boat on and off to achieve mobility.

Imposing a duty to go through some process to ascertain whether the attempt to put the transmission in neutral was successful would have many of the same undesirable effects. It is conceivable that a fallen skier could be lost because of the delay occasioned by the driver's efforts to determine whether the propeller is still turning. Furthermore, imposing liability may ultimately cause ski boat owners to refrain from engaging in the sport at all.

C. Increasing the Inherent Risks of the Sport

Participants in active sports do not have a duty to eliminate or protect other participants from inherent risks of the sport. (*Knight v. Jewett, supra,* 3 Cal.4th at pp. 315-316.) However, a duty is imposed on participants not to increase the risks to others over and above those inherent in the sport. (*Ibid.*) Legal liability is proper only when a participant intentionally injures a coparticipant or engages in conduct so reckless as to fall outside the ambit of ordinary activities associated with the sport. (*Id.* at p. 318.)

Plaintiff asserts defendant's conduct in retrieving her from the water increased her risk over and above those inherent in the sport. Plaintiff attempts to analogize to the situation where a ski resort was found to have increased the risk inherent in the sport of snow skiing by failing properly to maintain the towropes used to carry snow skiers up the slopes. (*Knight v. Jewett, supra,* 3 Cal.4th at p. 316.) However, plaintiff fails to articulate any specific factual reasoning to show why the cases are similar. Indeed, plaintiff's logic is flawed. The towrope cases illustrate the principle that imposition of liability varies according to whose conduct is at issue in a given case. (*Knight v. Jewett, supra,* 3 Cal.4th at p. 316.) Liability of an entity, such as a ski resort, is premised on the steps *business entities* should be obligated to take in order to minimize risks without altering the fundamental nature of the sport. (*Id.* at pp. 316-317.) Clearly, defendant, an amateur boater in a social or recreational setting, is not a business entity and thus is not held to the same set of standards as a ski resort or another business entity engaged in providing sports opportunities as part of a profit-making undertaking. The premise of imposing liability is the judicial perception as promulgated in case law that business owners are better able to allocate costs than individual recreational or social participants. Such a judicial perception or policy has no applicability to a social or recreational ski boat operator, such as defendant. Therefore, plaintiff's reliance on the towrope cases is inapposite.

Plaintiff also contends it is illogical to argue about increasing the risks inherent in the sport because she was no longer engaged in the active sport of waterskiing. As addressed earlier in this opinion, this argument has no merit.

Additionally, plaintiff contends defendant's conduct, by pulling her to the boat while the motor was engaged, was so reckless, it was totally outside the range of ordinary activities associated with waterskiing. Plaintiff seems to be confused as to what conduct is in question. The conduct at issue is not pulling her into the engaged motor, but is the act of recovering her from the water while the boat's motor was, purportedly, in neutral. Defendant neither intentionally nor recklessly pulled plaintiff into the engaged motor. He believed the motor was in neutral. As discussed previously, the evidence established leaving the boat in neutral is a common and safe method used to recover skiers from water. Plaintiff concedes it is a method virtually assuring safe recovery into the boat. As it is a common practice to leave the ski boat's motor in neutral when recovering skiers, any risks associated with the practice are inherent in the sport. The fact defendant may have been negligent in not properly disengaging the propeller, does not take the activity outside of the ordinary activities associated with waterskiing. Furthermore, regardless of the common occurrence of the practice in question, waterskiing, by its very nature, places participants at risk of sustaining injuries from unintentional contact with a propeller, moving or stationary. In the absence of intentional or reckless conduct, a

coparticipant boat driver will not be liable for a waterskier's unfortunate contact with the boat's propeller.

Finally, plaintiff states the act of not double-checking to make sure the motor was in neutral was enough to bar application of primary assumption of the risk. Defendant concedes he may have been negligent in not double-checking the engine. Plaintiff asserts several times defendant was *negligent* in not properly disengaging the propeller. However, ordinary negligence is not enough to impose liability on a ski boat operator. (*Ford v. Gouin, supra,* 3 Cal.4th at p. 345.) The policy behind the assumption of the risk doctrine, to encourage vigorous participation in sports and activities, allows liability only for intentional or reckless conduct totally outside the ordinary scope of the activity. (*Knight v. Jewett, supra,* 3 Cal.4th at p. 318.) Defendant's conduct in not double-checking the transmission was neither intentional nor reckless. Therefore, since defendant acted neither intentionally nor recklessly, primary assumption of the risk provides a defense.

D. Duty Based Upon Public Policy

Plaintiff contends public policy mandates the imposition of a duty of due care on defendant. Plaintiff bases this contention on a negligence theory, stating a person is liable for any injuries arising out of a failure to use reasonable care under the circumstances. (*Knight v. Jewett, supra*, 3 Cal.4th at p. 315.) Exclusions from liability for negligence may be granted only when the exclusion is based upon a express statutory exclusion or when public policy clearly mandates it.

(*Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) Plaintiff alleges there is neither a statute nor a public policy supporting the application of assumption of the risk to this case. Further, plaintiff argues the application of assumption of the risk to this case would only promote the negligent operation of ski boats and cause injuries and fatalities.

Assumption of the risk doctrine is premised upon public policy. Public policy encourages vigorous participation in sports and activities without interference from courts. (*Knight v. Jewett, supra,* 3 Cal.4th at pp. 318-319.) Imposition of liability for ordinary negligent or careless conduct is prohibited because of the chilling and altering effect liability would have on sports and activities. (*Ibid.*) Public policy favors a limitation on the liability of coparticipants in the sport of waterskiing. Only when the conduct is intentional or so reckless as to fall outside the scope of ordinary activities associated with waterskiing will liability be imposed on coparticipants. By doing so, the proper balance is struck between encouraging vigorous participation and deterring conduct not inherent in the sport itself. The imposition of liability would have a deleterious effect on waterskiing if imposed on coparticipants, such as defendant; therefore, public policy dictates no duty should be imposed on defendant in this case.

II

Admissibility of Evidence in Support of the Judgment

Plaintiff asserts the reasons articulated by the trial court for granting the motion for summary judgment are not

supported by admissible evidence. The trial court based its ruling, finding plaintiff, a coparticipant, was injured by a risk inherent in waterskiing, on the deposition of plaintiff, the deposition of an experienced ski boat driver Edward Vandermeulen, and defendant's declaration in support of the motion for summary judgment. Plaintiff contends the ruling was not supported, and in fact, was contradicted by the undisputed facts. To the contrary, the undisputed facts establish the applicability of primary assumption of the risk.

When there are sufficient legal grounds to support the trial court's order, the summary judgment order will be upheld regardless of the grounds relied upon by the trial court. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457.) We are to reassess the legal significance and effect of all papers presented by both parties in connection with the motion for summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) To determine whether there is an issue of material fact, the court considers all of the evidence and all reasonable inferences therefrom, except that evidence to which objections have been made and sustained. (§ 437c, subd. (c).)

Plaintiff asserts no admissible evidence supports finding defendant and plaintiff were coparticipants. She contends it was undisputed she had finished waterskiing, thereby ending the coparticipant status. However, as previously addressed, the undisputed fact was she had finished her "waterski run," not that she was no longer a participant. Plaintiff's declaration

to the contrary is inconsequential. Whether or not the plaintiff and defendant are coparticipants is a matter for the court to decide. (*Yancey v. Superior Court, supra,* 28 Cal.App.4th at p. 562.)

Plaintiff further argues the trial court improperly overruled her objection to defendant's declaration and the deposition testimony of Edward Vandermeulen, which supported the findings concerning the nature of and ordinary activities included in the sport of waterskiing. We disagree.

Plaintiff objected at the hearing to the evidence proffered by defendant, including defendant's declaration and the deposition testimony of Edward Vandermeulen, arguing the testimony constituted legal conclusions, and alternatively, as a factual opinion, the testimony was irrelevant and immaterial to the motion. The trial court overruled these objections because a witness may testify concerning his or her own experience. The experience of ski boat drivers, such as defendant and Edward Vandermeulen, was relevant because that is the sport in which the participants were engaged when plaintiff was injured. Furthermore, the averments concerning their experience did not constitute legal conclusions. Plaintiff could have offered rebuttal declarations or contrary evidence in this regard, but failed to do so. The trial court's decision to overrule the objection was correct.

It is our task, as the reviewing court, to view the record de novo to determine if the evidence supports summary judgment. The existence and scope of the duty owed to the plaintiff by the

defendant is a matter of law (*Yancey v. Superior Court, supra,* 28 Cal.App.4th at p. 562), as are the factors making up said duty. (*Ibid.*) Even considering the evidence in a light most favorable to the plaintiff, her arguments fail. Plaintiff has presented no evidence to show the existence of a triable issue of material fact, and thus, she has not met her burden.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

I concur:

SCOTLAND, P.J.

I concur in the result:

HULL, J.